Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 82-299
82-300

In The
Supreme Court of the United States

October Term, 1981

The Travelers Insurance Company,
Appellant

v.

The Attorney General of the Commonwealth
of Massachusetts,
Appellee

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The Metropolitan Life Insurance
Company,
Appellant,

v.

The Attorney General of the Commonwealth
of Massachusetts
Appellee

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# Motion To Affirm The Judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts or To Dismiss The Appellants' Appeals

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## I. QUESTIONS PRESENTED

1. Whether a substantial federal question is presented regarding the preemption of a state insurance law by the Employee Retirement Income Security Act, 29 U.S.C. §§1001 et seq. (ERISA), where ERISA explicitly exempts state insurance laws from its coverage.

2. Whether the application of a generally applicable state insurance law, which does not favor either labor or management, to insurance purchased by an employer for employees covered by a collective bargaining agreement, presents a substantial question of preemption by the National Labor Relations Act, 29 U.S.C. §§151 et seq. (NLRA).

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## III. MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS OR TO DISMISS THE APPELLANTS' APPEALS

Pursuant to Rule 16 of the Rules of this Court, the Commonwealth of Massachusetts moves that Appellants' Appeals be dismissed or that the Judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts be affirmed on the ground that it is plainly correct and the questions presented by the jurisdictional statements are so unsubstantial as to warrant no further argument.

## IV. STATEMENT OF THE CASE

Massachusetts General Laws, Chapter 175, §47B (Section 47B) (App. H.) requires all health insurance policies covering residents of the Commonwealth of Massachusetts to provide minimum benefits for inpatient and outpatient treatment of mental illness.

The appellant insurance companies attempt to avoid operation of Section 47B and the necessity of writing policies containing its benefits by asserting that such state regulation of insurance, a traditional state right,[1] is preempted by federal laws regulating employee welfare plans[2] and collective

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1/ Insurance regulation is generally reserved for the states. McCarran-Ferguson Act, 15 U.S.C. §§1011 et seq.

2/ Employee Retirement Income Security Act, 29 U.S.C. §§1001 et seq. (ERISA)

bargaining.[3/] Employee benefit plans are affected by Section 47B, the insurance companies assert, insofar as such plans purchase health insurance for covered employees; collective bargaining is said to be affected because health insurance benefits may be set in the course of that process.

The impact of Section 47B on the federal concerns expressed in ERISA and the NLRA was the focus of the trial below and forms the touchstone for the trial court and the Supreme Judicial Court decisions that neither ERISA nor the NLRA preempt Section 47B. The trial court made lengthy findings of fact regarding the impact of Section 47B on the concerns expressed in ERISA and the NLRA generally, and found no basis for

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3/ National Labor Relations Act, (NLRA) 29 U.S.C. §§151 et seq.

establishing any conflict between Section 47B and those federal statutes. (App. C., 39a-44a). With respect to the crucial element of cost impact of Section 47B on ERISA plans, the trial court found that defendants had produced no credible evidence regarding the additional cost impact of Section 47B. Specifically the court found that no evidence was produced that the insurance companies could not absorb the cost of compliance with Section 47B, and no credible evidence was produced that any ERISA plan in the United States had gone bankrupt because of its compliance with a mandated benefit statute. Indeed, the trial court found no credible evidence (1) to establish the actual cost which the insurers would incur if they complied with Section 47B; (2) to establish that the cost impact potential

of Section 47B had forced any holder of a policy which complies with Section 47B to discontinue insurance coverage and become a self-insurer; or (3) to prove that the trend toward self-insurance is more pronounced in Massachusetts than elsewhere by virtue of the enactment of Section 47B. (App. C. 42a-77a).[4/]

With respect to the NLRA, the trial court found that collective bargaining agreements commonly reserve to the

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4/ The Appellant Metropolitan's Jurisdictional Statement, however, blithely ignores those findings and baldly asserts that the insurance carriers "demonstrated at trial without dispute" that state mandated benefits statutes, such as Section 47B, significantly increase the cost of plan administration, force beneficiaries to choose between paying higher premiums, sacrificing other benefits and foregoing insurance altogether. Jurisdictional Statement of Metropolitan Life Insurance Company, Appellant, at 4 and 5. Such statements have no support in the Findings and Conclusions of the trial court and should not be considered by this Court. (App. C. 24a-77a).

employer the right to alter any portion of the agreement to comply with any applicable change in state or federal law and that collective bargaining agreements differ in many respects from state to state or from bargaining unit to bargaining unit because of differences in state and local law. (App. C. 43a).

## V. ARGUMENT

### A. Summary Of Argument

The Supreme Judicial Court and trial court were correct to reject the insurance companies arguments.[5/] The

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5/ In so doing, accord was reached with other courts which have addressed the same defenses to mandated benefits statutes posed by these same Appellants. See Wadworth v. Whaland, 562 F.2d 70 (1st Cir. 1977); cert. denied, 435 U.S. 980 (1978); Metropolitan Life Ins. Co. v. Whaland; 119 N.H. 984, 410 A.2d 635 (1979). See also Eversole v. Metropolitan Life Ins. Co., 500 F.Supp. 1162 (C.D. Cal. 1980).

purpose of ERISA was to correct widespread abuses in the area of administration of employee pension and welfare plans. Reporting, disclosure and fiduciary standards are the heart of ERISA. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981); Wadsworth v. Whaland, 562 F.2d 70, 73-74 (1st Cir. 1977); Attorney General v. Travelers Ins. Co., 385 Mass. 598, 606-607 (1982) (App. A. 10a). To these ends, ERISA specifically preempts state law. 29 U.S.C. §1144(a). The substantive content of ERISA plans, such as insurance benefits affected by Section 47B, however, is untouched by ERISA's regulatory scheme. Wadsworth v. Whaland, supra, at 73-74; Attorney General v. Travelers Ins. Co., supra (App. A. 10a). See Alessi, supra, at 510. See also Gast v. State, 36 Or. App. 441, 585 P.2d (1978).

Moreover, ERISA contains a "savings clause," which explicitly exempts from its preemption clause any state statute which "regulates insur- ance"; this Section 47B unquestionably does.[6/] In the absence of evidence that Congress unmistakably ordained pre- emption of Section 47B by ERISA, this Court should not find preemption. Alessi, supra at 522.

The insurance companies also suggest that the NLRA preempts Section 47B. In enacting the NLRA, Congress did not intend to bar states from protecting the public health of their citizens. Section 47B is supported by an exceptionally strong state interest in the mental

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6/ ERISA's savings clause provides that "... nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities". 29 U.S.C. §1144(b)(2)(A).

health of residents of the Commonwealth. Moreover, state laws such as Section 47B, which do not regulate labor management relations as such, but merely touch on areas of peripheral concern to the NLRA, are not preempted. Accordingly, the Attorney General submits that the appeals by the insurance companies raise no substantial federal question, that this appeal should be dismissed, and that the Judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

B. Appellants' Questions Are Not Substantial

In Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), the first case construing the preemption language of ERISA, this Court reiterated a basic principle governing preemption in

general and as applied to ERISA:

> "[p]reemption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981), quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). See Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977); Perez v. Campbell, 402 U.S. 637, 649 (1971); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Hines v. Davidowitz, 312 U.S. 52, 61-62 (1941).

Alessi, supra, at 522. In this case, neither ERISA nor the NLRA contains language or is supported by legislative history explicitly requiring preemption of Section 47B. Nor does Section 47B create a conflict with either statute such that this Court should conclude that ERISA or national labor policy permit but one conclusion -- preemption. A reading of the decision below confirms

the Attorney General's view that the order of the Supreme Judicial Court mandating compliance by the Appellants with Section 47B should stand and the appeals should be summarily dismissed.

C. ERISA Does Not Preempt Section 47B

Section 47B survives the Supremacy Clause on the strength of ERISA's savings clause and the clear history of Congressional deference to the states in the regulation of the business of insurance, as evidenced by the McCarran-Ferguson Act, supra.

In evaluating whether Congress has unmistakably ordained preemption of Section 47B, ERISA's broad preemption of "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. §1144(a), must be read in conjunction

with the savings clause which provides that:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

29 U.S.C. §1144(b)(2)(A).

Thus, Section 47B is safe from preemption because it is an insurance law.[7/] This reading of Section 47B's interplay with ERISA comports with the general attitude of Congress toward state regulation of insurance as expressed in the McCarran-Ferguson Act.[8/]

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7/ The Supreme Judicial Court suggested a narrower view of the savings clause of ERISA, but reached the same result. The Attorney General believes that a straightforward reading of the savings clause, per se ipsum, saves Section 47B from preemption by ERISA.

8/ The McCarran-Ferguson Act, 15 U.S.C. §1012(b,) provides, in pertinent part, that:

(footnote continued)

Appellants argue that Congress established a policy of national unformity of benefits in welfare plans that is fatally undermined by the varying requirements imposed on the content of welfare plans by mandated benefit statutes such as Section 47B. They argue that Congress meant to exempt from preemption all insurance laws except those that "undercut one of the primary congressional purposes in enacting ERISA -- encouraging uniformity of coverage in plans covering employees in several states." Appellant Metropolitan's Jursidictional Statement at 7.

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(footnote continued)

> no act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance ... unless such act specifically relates to the business of insurance ....

The Supreme Judicial Court was not persuaded by the insurers' contentions:

> Congress undoubtedly contemplated a system of uniform, national regulation in the areas governed by ERISA. On the other hand, it specifically approved State regulation in the fields of insurance, banking and securities, and so could not have intended to mandate complete uniformity for the convenience of multi-state employers. Moreover, the judge below stated in his findings that the defendants had presented "no credible evidence that [diverse State mandatory benefit laws] would be any more complex or burdensome to interstate commerce than various other ... multi-state regulatory schemes such as workmen's compensation laws."

Attorney General v. Travelers Ins. Co., 385 Mass. 598, 609,. (1982) (App. A. 12a-13a) (emphasis supplied).

Nothing in Alessi requires a different reading of ERISA. While acknowledging that in enacting ERISA Congress expressed an intention to establish pension regulation "as exclusively a federal concern," this Court was careful to

point out that "the scope of federal concern is, however, limited by ERISA itself. The statute explicitly preserves state regulation of insurance, banking and securities." Alessi, supra, at 523 n. 19. The insurance companies' argument that Alessi requires preemption of Section 47B because it indirectly intrudes on an area of "exclusive federal concern" misses the mark. Even if Section 47B is termed an intrusion on welfare plans, such intrusion is outside the parameters of "exclusive federal concern."

In contrast, in Alessi this Court struck down a state law which prohibited a practice, "set off", which ERISA permits.[9/] In that case, the operation

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9/ The New Jersey statute prohibited the set-off of workers' compensation benefits against pension benefits in calculating a workers pension. ERISA permits such a "set-off". Alessi, supra, at 517-525.

of ERISA evidenced an unmistakable intent of Congress that the New Jersey statute fall to preemption. Ibid. at 524-25.

This case, unlike Alessi, involves a statute which regulates insurance, as permitted by ERISA's savings clause and the McCarran-Ferguson Act, and which does not purport to do something ERISA forbids.[10/] Attorney General v. Travelers Ins. Co., supra (App. A. 10a).

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10/ Appellants latch onto the phrase "indirect intrusion" and contort its meaning in Alessi. The statute in question was a workers' compensation statute, not a pension regulation statute. Ruling that the statute, although not in form a pension regulation statute, in substance had an impact on a matter regulated by ERISA, the Court held that it was preempted. It termed the intrusion on ERISA "indirect" because the general purpose of the law was not pension regulation. Here, in contrast, Section 47B does not affect matters regulated by ERISA either in form or in substance, since ERISA makes no mention whatsoever of the level of welfare benefits, such as mental health benefits, that an ERISA plan must provide.

ERISA is silent as to the content of insurance plans purchased by employee welfare plans. Attorney General v. Travelers Ins. Co., supra (App. A. 10a). See Gast. v. State, supra.

Appellants also argue strenuously that, as a factual matter, compliance with Section 47B or other mandated benefits laws will be extremely expensive and will encourage welfare plans to self-insure, thus weakening the protection afforded employees. The shortcoming of this argument is that it lacks any factual basis. Indeed this argument was rejected by the trial court for lack of evidence. (App. C. 42a). This Court should accordingly reject it, too.

Lastly, Appellants advance a qualified reading of the savings clause,

i.e., that Congress meant to allow states to regulate only "traditional areas" of insurance such as sales, advertising, solvency, licensing and reserves. Appellant Metropolitan's Jurisdictional Statement at 15. This interpretation ignores the plain words of the savings clause. Furthermore, no support for the distinction between traditional and non-traditional insurance regulation appears in ERISA, its legislative history, or in cases decided under ERISA.

D. The NLRA Does Not Preempt Section 47B

The insurance companies, who are themselves generally strangers to the collective bargaining process, next argue that because health benefits are subject to collective bargaining, Section 47B is

impliedly preempted by the NLRA.[11/] The implication of preemption arises, they assert, because Section 47B requires employers who purchase health insurance in order to cover negotiated benefits to provide certain minimum mental health benefits. The insurance companies thus assert that a state has no power to regulate matters affecting its citizens, even matters of traditional state concern, if those matters are the subject of collective bargaining. This position grossly enlarges the scope of NLRA

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11/ The doctrine of labor law preemption comprises two strands of analysis first articulated in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). First, state action is preempted if it regulates conduct that is clearly or arguably protected or prohibited by the NLRA, §§7, 8. The second strand, implied labor law preemption, is applied to conduct regulated by state law, but not arguably protected or prohibited by the NLRA. As Appellants have recognized, only the second line of analysis is potentially applicable here.

implied preemption and works an absolute shift of federal-state responsibilities in areas, such as insurance regulation, which Congress and this Court have expressly declared to be traditional subjects of state regulation.

Carried to its logical conclusion, the insurance companies' argument would lead to the absurd result of vitiating all state regulation of insurance, for insurance regulation will almost certainly have an impact on some subject matter potentially covered by collective bargaining agreements. Shall we conclude then from the insurers' argument that a state may not regulate minimum levels of automobile insurance merely because a collective bargaining agreement purports to provide a different coverage level? Nor could the insurers' expansion of the doctrine of implied preemption be

logically confined to insurance regulation, since many employee benefits fall within the ambit of the state's police power. Shall we conclude that a state may not legislate mandatory state holidays, merely because a collective bargaining agreement purports to establish all holidays for covered employees? Shall we conclude that a state may not require an employer to pay an employee for days spent on jury duty, merely because the collective bargaining agreement purports to establish all paid days off for employees. The absurdity of the insurers' argument should be clear.

The Supreme Judicial Court was not persuaded by this argument:

> Despite the breadth of its statements concerning the preemptive effect of collective bargaining agreements, the Supreme Court has recognized that Congress could not have intended to preempt "all local regulation

> that touches or concerns in any way the complex interrelationship between employees, employers and unions, obviously, much of this is left to the states." Malone v. White Motor Corp., 435 U.S. 497, 504 (1978), quoting from Amalgamated Ass'n of St., Elec. Ry & Motor Coach Employees v. Lockridge, 403 U.S. 274 289 (1971). See Massachusetts Council of Const. Employees, Inc. v. Mayor of Boston, Mass. Adv. Sh. (1981) 2039, 2045-2046, cert. granted, ___ U.S. ____, 102 S. Ct. 1273, 71 L.Ed. 2d _____ (1982).

Attorney General v. Travelers Ins. Co., supra (App. A. 15a). Moreover, this Court has implicitly rejected Appellants' argument by upholding a state statute with a significant, direct impact on collective bargaining. New York Telephone Co. v. New York Department of Labor, 440 U.S. 519 (1979). In that case a New York law allowing striking employees to collect unemployment benefits was upheld, despite the fact that the statute materially aided labor's ability to pressure management to

concede issues which had initally caused the strike. A plurality of the Court held that the state law was designed to foster unemployment security, a legitimate state concern which moreover had been specifically reserved for state action by the drafters of the NLRA and the Social Security Act. Ibid. at 527-546. The Court thus rejected the notion that state laws designed to protect legitimate local concerns are automatically invalidated if such laws interfere with federal labor policy. In New York Telephone, Justice Stevens stressed that the objective of the state legislature in passing the challenged statute and the intent of Congress to permit local objectives are the key criteria in assessing whether federal preemption is

operative:

> New York has not sought to regulate private conduct that is subject to the regulatory jurisdiction of the National Labor Relations Act. Nor indeed has it sought to regulate any private conduct of the parties to a labor dispute. Instead, it has sought to administer its unemployment compensation program in a manner that it believes best effectuates the purposes of that scheme. In an area in which Congress has decided to tolerate a substantial measure of diversity, the fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reasons for concluding that Congress intended to preempt that exercise of State power.

New York Telephone Co. v. New York Labor Department, supra, at 545-546.

Section 47B meets the New York Telephone standard. There is no doubt that the Massachusetts Legislature, in enacting Section 47B, was seeking to benefit directly the welfare and health of its

citizens.[12/] Nor is there doubt that Congress, in enacting ERISA and the McCarran-Ferguson Act, reserved insurance regulation for the states.

This Court has struck down state statutes when they have favored either labor or management in the collective bargaining process on the ground that they are unwarranted and deliberate intrusions into federal labor policy.

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12/ By means of Section 47B, the Massachusetts Legislature sought to protect its citizens from the burdensome costs of mental health care; to promote access to mental health care for poor, working and middle class people; to foster community based care and reduce the need for institutionalizing the mentally ill; to reduce the incidence and societal cost of treatment of psychosomatic illness by improving access to mental health care and to relieve the extreme financial burden institution-based mental health care placed on the taxpayers of Massachusetts. (App. C. 42a). The trial court found that Section 47B accomplishes these purposes. (App. C. 38a-41a).

However, unlike the state antitrust law which purports to regulate prices and wages in Local 34, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283 (1959), or the state law prohibiting secondary boycott by labor in Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), Section 47B, a statute of general applicability, does not alter the balance of power between labor and management by restricting the weapons available to either party in their negotiations.

Finally, the insurance carriers make the interesting but unsupportable contention that Section 4 of the McCarran-Ferguson Act, which provides that "[n]othing contained in this chapter shall be construed to affect in

any manner the application to the business of insurance of the [NLRA]...", 15 U.S.C. §1014, should be construed so as to prevent the states from exercising their statutory prerogative to regulate the insurance industry if such regulation has an impact, however indirect, on the allegedly absolute freedom of those entities involved in collective bargaining negotiations. Travelers characterizes this issue as a novel issue and points out that no federal court has ever considered the precise issue it raises. The novelty of Travelers claim, in itself, presents no reason for this Court to grant plenary consideration. Its novelty may instead reflect the speciousness of the claim. A more logical and correct reading of Section 4 of the McCarran-Ferguson Act has been adopted by the Supreme Judicial Court of

Massachusetts in this case. Attorney General v. Travelers Ins. Co., supra, (App. C. 18a-19a), n. 25. The Supreme Judicial Court held that Section 4 was only intended to preserve NLRA applicability to labor-management relations within the insurance industry.

In sum, Section 47B affects only peripherally subjects of mandatory collective bargaining. It seeks to solve a serious health problem - the lack of affordable and adequate mental health care - through the regulation of insurance, a recognized preserve of state concern.

## VI. CONCLUSION

For the foregoing reasons, the decision below should be summarily affirmed and the insurance companies' appeals should be dismissed.

Respectfully Submitted,

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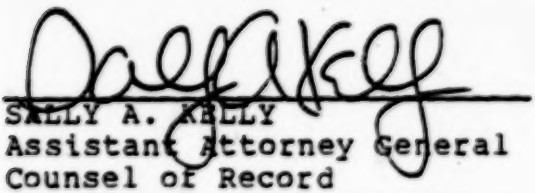

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